Supreme Court, U.S.
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No. 87-1691

In the Supreme Court of the United States

OCTOBER TERM, 1987

REINALDO ORELLANES, aka REINALDO ORELLANE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's convictions under 18 U.S.C. (1982 ed.) 922(h)(1) for possessing firearms and ammunition should be reversed in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 809 F.2d 1526.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on February 17, 1987. A petition for rehearing was denied on January 12, 1988 (Pet. App. 22). On March 15, 1988, Justice Kennedy extended the time for filing a petition for a writ of certiorari to April 11, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional plea of guilty in the United States District Court for the Southern District of Florida,

petitioner was convicted on six counts of receipt of a firearm by a previously convicted felon and on one count of receipt of ammunition by a previously convicted felon, all in violation of 18 U.S.C. (1982 ed.) 922(h)(1). Petitioner was sentenced to six months at a community treatment center, to be followed by four years' probation. Pet. App. 17.

1. On July 28, 1981, petitioner pleaded guilty in a state court in Florida to the felonies of possessing marijuana and carrying a concealed firearm. The Florida court, acting under a state law (Fla. Stat. Ann. § 948.01 (West Supp. 1988)),[1] placed petitioner on probation for 18 months but did not enter a formal judgment of conviction. Later, on six separate occasions, petitioner purchased firearms and ammunition at a gun shop in Miami, Florida. Pet. App. 15-16.

On October 29, 1985, a federal grand jury returned an indictment charging petitioner with eight counts of receipt of a firearm by a previously convicted felon and one count of receipt of ammunition by a previously convicted felon, in violation of 18 U.S.C. (1982 ed.) 922(h)(1). The indictment also charged petitioner with one count of possession

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[1] Section 948.01 provides in pertinent part:

* * * * *

> (3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation.

* * * * *

of a controlled substance. Petitioner moved the district court to dismiss the firearms charges on the ground that his guilty pleas in the Florida state court were not convictions for the purpose of 18 U.S.C. (1982 ed.) 922(h)(1). The district court denied the motion. Petitioner then pleaded guilty to seven counts of violating the firearms statute, and the government dismissed the remaining counts. Pet. App. 17.

2. The court of appeals affirmed (Pet. App. 15-20). Petitioner argued on appeal that his convictions should abate in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986 Act), which became effective while the appeal in this case was pending. That Act amended the federal firearms statute by providing that "[w]hat constitutes a conviction [for purposes of the statute] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held" (18 U.S.C. (Supp. IV) 921(a)(20)). Previously, this Court had held in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law * * *" (*id.* at 111-112), and that a plea of guilty, followed by a sentence of probation, is a conviction even though a formal judgment is not entered (*id.* at 114). Petitioner argued that his guilty pleas in state court were not convictions under Florida law and, therefore, that the 1986 Act should abate his prosecution for violating 18 U.S.C. (1982 ed.) 922(h)(1).

The court of appeals rejected petitioner's contention for two independent reasons. First, relying on *State* v. *Gazda*, 257 So. 2d 242, 243-244 (Fla. 1971), the court held (Pet. App. 18-19) that a guilty plea constitutes a conviction under Florida law even though formal adjudication is withheld. Second, the court of appeals ruled (*id.* at 19-20)

that the 1986 amendment to the federal firearms statute does not require reversal of petitioner's convictions, even if his guilty pleas were not convictions under Florida law, because the 1986 Act does not apply retroactively.

ARGUMENT

The judgment of the court of appeals is correct. In *Dickerson* v. *New Banner Institute, Inc., supra*, this Court held (460 U.S. at 114) that a plea of guilty in a state court, followed by a sentence of probation, constitutes a conviction within the meaning of 18 U.S.C. (1982 ed.) 922(h)(1), even if a formal judgment of conviction is not entered. Thus, it is clear that, at the time petitioner possessed firearms and ammunition, his conduct violated the federal firearms statute. See *United States* v. *Garcia*, 727 F.2d 1028, 1029 (11th Cir. 1984). Petitioner does not dispute that point.

In 1986, Congress amended the federal firearms statute by enacting the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, which provides that the meaning of "conviction" under the federal statute must be determined by reference to state law. But that amendment did not take effect until after petitioner's convictions in this case. See Pet. App. 20. Thus, the only issue in this case is whether Congress intended the 1986 Act to apply retroactively. And the answer to that question is plainly "no." See *United States* v. *Carter*, 801 F.2d 78, 83 (2d Cir.) ("retrospectivity is plainly contrary to Congress's intent"), cert. denied, 479 U.S. 1012 (1986); see also *United States* v. *Jackson*, 824 F.2d 21, 22-23 & n.2 (D.C. Cir. 1987), cert. denied, No. 87-5667 (Jan. 11, 1988); *United States* v. *Breier*, 813 F.2d 212, 215 (9th Cir. 1987), cert. denied, No. 87-986 (Mar. 21, 1988).

The general federal saving statute—1 U.S.C. 109—provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability" under that statute "unless the repealing Act shall so expressly provide." The saving statute applies to statutory amendments as well as to repeals. See *United States* v. *Breier*, 813 F.2d at 215; *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975) (per curiam). The saving statute creates a presumption in favor of nonretroactivity, and there is nothing in the Firearms Owners' Protection Act to rebut that presumption. On the contrary, the 1986 Act provided that its amendments became effective 180 days after enactment. See § 110(a), 100 Stat. 460. Thus, the courts of appeals have uniformly applied 18 U.S.C. (1982 ed.) 922(h)(1), as interpreted by this Court in *Dickerson*, to offenses committed before the effective date of the 1986 amendment. See *United States* v. *Pennon*, 816 F.2d 527, 529 (10th Cir. 1987), cert. denied, No. 87-5388 (Dec. 14, 1987); *Flippins* v. *United States*, 808 F.2d 16, 18-19 (6th Cir. 1987), cert. denied, No. 86-6656 (May 18, 1987). Accordingly, the court of appeals correctly affirmed petitioner's convictions.[2]

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[2] The court of appeals did not need to reach the question of Florida law presented in the petition—*i.e.*, whether petitioner's guilty pleas in state court, followed by a sentence of probation, are convictions under Florida law. Nevertheless, there is ample support for the court of appeals' interpretation of Florida law. See *State* v. *Gazda*, 257 So. 2d 242, 243-244 (Fla. 1971) ("the term 'conviction' means determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court"). Of course, this Court generally does "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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